In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1266

WALTER DLUTZ, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–2)[1] is reported at 406 F. 2d 227. Neither the initial decision of the hearing examiner (R. 9, Initial Decision) nor the final order and opinion of the Federal Trade Commission (R. 9, Final Order-Opinion) is officially reported.

JURISDICTION

The judgment of the court of appeals (R. 14) was entered on February 18, 1969. The petition for a

[1] "Pet. App." refers to the slip opinion of the court of appeals, affixed to the petition for certiorari.

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writ of certiorari was filed on April 15, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Trade Commission properly included petitioner, as an individual, among those it ordered to cease and desist the deceptive practices of a corporation of which he was president, treasurer, one of three directors, and sole stockholder?

STATUTE INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, as amended by 52 Stat. 111 and 66 Stat. 632 (15 U.S.C. 45(a)(1)), provides:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

Petitioner seeks review of a cease-and-desist order entered against him, another individual, and a District of Columbia corporation, by the Federal Trade Commission (R. 9, Final Order) and affirmed *per curiam* by the court of appeals (Pet. App. 1–2). Petitioner does not challenge the Commission's finding that the corporation and the other individual engaged in deceptive practices; he contends only that the order should not have been directed against him individually.

The order directs (R. 9, Final Order, pp. 1–2):

> that respondents, General Transmissions Corporation of Washington, a corporation, and its

> officers, and Walter Dlutz, individually and as an officer of said corporation, and William J. Green, Jr., individually and as an agent of said corporation, and their agents, representatives and employees, directly, or through any corporate or other device, * * *

cease and desist from specified misrepresentations and other deceptive practices in connection with the sale, advertising and repair of automobile transmissions, motors or other products or services in interstate commerce (R. 9, Final Order, pp. 1–6). The named corporation is engaged in the business of repairing, overhauling, rebuilding and selling automotive transmissions (R. 9, Final Order-Opinion, p. 3). Petitioner is president, treasurer, one of the three directors and sole stockholder (R. 9, Final Order-Opinion, p. 3; R. 9, Initial Decision, p. 19).[2] Petitioner has interests in nine other transmission repair businesses in several states (R. 11, p. 1a, Testimony of Walter Dlutz). William Green, the other individual named in the order, was at all relevant times the corporation's general manager (R. 9, Final Order-Opinion, p. 3).

The Commission found that petitioner, Green, and the corporation had made a variety of false and misleading statements, through advertising and oral representations, concerning the price and quality of their services and the conditions upon which those services would be performed (*ibid.*). The whole method of operation was found to be unfair and deceptive: the

[2] Petitioner's wife is the only other officer of the corporation and is also a director (R. 9, Final Order-Opinion, p. 3).

evidence showed a common pattern in which a customer was induced to authorize the repair of his automobile by representations as to the low cost of repairs; was informed later of the need for much more extensive repairs than those originally anticipated; and was told that to reassemble and reinstall the transmission without repair would require an additional charge over the advertised price or would be impossible without the supposedly necessary additional parts and labor (*ibid.*). The Commission found "several cases of willful fraud, embodied in the deliberate nonperformance of services for which payment was received" (R. 9, Final Order-Opinion, p. 7), and that the testimony of all the customer-witnesses established a clear pattern and method of doing business permeated with deception (*ibid.*).

The Commission determined that petitioner formulated, directed and controlled the policies, acts and practices of the corporation (R. 9, Final Order-Opinion, p. 17). The record shows that he hired the manager, ordered the equipment and merchandise, and signed the lease for the corporation. (R. 9, Final Order-Opinion, p. 16.) All records were kept in petitioner's office in Philadelphia, to which they were transmitted daily from Washington; all bookkeeping was done there and most bills were paid from the office (*ibid.*). While petitioner did not regularly work in the Washington shop, he had himself worked on one witness' car and made representations to him "fitting perfectly the pattern of deception" established by the other evidence (*ibid*). The Commission

ruled that petitioner's control of the corporation's policies and practices, and his responsibility for the violations, required his inclusion in the order, and that failure to include him "would eviscerate it and insure its ineffectiveness" (R. 9, Final Order-Opinion, p. 19).

ARGUMENT

Petitioner urges this Court to "review the evidence in this case that purportedly implicates Walter Dlutz as an individual performing a violation of Section 5 of the Federal Trade Commission Act" (Pet. 3). The court of appeals has already reviewed the evidence, however, and held that it supports the Commission's findings (Pet. App. 2) and there is no occasion for further review.

Petitioner's suggestion (Pet. 3), that the order runs against him only because he is the "sole stockholder" of the corporation, misreads the basis of the Commission's decision. The Commission carefully reviewed the indicia of actual control and of Dlutz's knowledge of, and participation in, the corporation's fraudulent conduct (see pp. 3–5, *supra*), and based its decision expressly thereon. (R. 9, Final Order-Opinion, pp. 16–19.) Application of the order to petitioner as an individual was fully justified in the circumstances. *Federal Trade Commission* v. *Standard Education Society,* 302 U.S. 112; *Pati-Port, Inc.* v. *Federal Trade Commission,* 313 F. 2d 103 (C.A. 4). Indeed, petitioner's similar interest in other transmission repair shops located throughout the country (R. 11, p. 1a, Testimony of Walter Dlutz) would afford

opportunities for perpetration of the precise deceptive and fraudulent practices found to exist in the Washington shop, if the order did not run against him personally. The order is thus a proper exercise of administrative discretion to remedy the evil found to exist and to prevent repetitions. See *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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